TONG KHENG BROS. (M) SDN. BHD.

v.

ANUARUL AINI MOHD. PERAI & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-354-89]
24 JULY 1990

CONTRACT: *Concession and lease agreement - Construction of terms - Actual interest of parties - Illegal by virtue of statutory enactment - Unlawful exercise of rights - Discharge of injunction - Section 24 Contracts Act.*

CIVIL PROCEDURE: *Ex parte interlocutory prohibitory injunction - Principles on which discharged - Illegality of agreements and contract - Null and void - Whether damages sufficient - Section 24 Contracts Act and s. 54(f) Specific Relief Act.*

The plaintiffs 'T' are a company incorporated in Kedah. The 1st and 2nd defendants D1 and D2, are the receivers and managers, of the assets of a company called SKKPJ, which are charged to the 3rd defendant D3 by a principal and supplementary debenture. T, D1 and D2 executed a concessional and lease agreement whereby T were appointed as independent contractors for the purpose of logging the concession area on certain terms and conditions in the lease agreement. The premises together with the sawmill and machinery were leased to T for a period of 2 years. T obtained an *ex parte* interlocutory prohibitory injunction against the defendants who are now seeking the discharge of the injunction.

Held:

[1] The provisions of the relevant statutes, make it clear that a person in the position of T, cannot lawfully exercise rights in a reserved forest or lawfully exercise rights in a sawmill by virtue of licences granted to someone else except with the prior written approval of the relevant state authority; the concession agreement and lease agreement were in fact an attempt to sell and purchase SKKPJ's rights under the licence to fell and extract timber and the licence to operate a sawmill.

[2] Both the concession agreement and the lease agreement were illegal, having regard to s. 24 of the Contracts Act, as being of such a nature that if permitted they would defeat the provisions of the law and that they are by reason of that section void; it is not possible to invoke the doctrine of severance to save the agreements as the invalidity nullifies the underlying intent of the parties - *Leong Poh Ching v. Chin Thin Sin* applied and followed.

[3] The interlocutory injunction is discharged:

a) as to maintain it would be tantamount to granting specific performance of an illegal agreement.

b) where a contract is tainted with illegality no relief can be granted in the shape of an injunction as stated in s. 54(f) of the Specific Relief Act 1950.

c) the plaintiffs' claim could be sufficiently met by an award of damages.

d) by maintaining the injunction, the plaintiffs would be given all the reliefs they are seeking at the final hearing. Since there is a valid defence to these claims, the injunction should not be granted.

[Interlocutory injunction discharged.]

Cases referred to:
Hee Cheng v. Krishnan [1955] MLJ 103
Leong Poh Chin v. Chin Thin Sin [1959] MLJ 246
Davies v. Mukuna 29 Ch D 596
Woodward v. Battersea Corporation [1911] 104 LT 51
Noor Aini binti Majid v. Pentex Sdn. Bhd. [1987] CLJ (Rep) 807
Manchester Corporation v. Connolly [1970] 1 Ch 420
Phillips v. Copping [1935] 1 KB 15

Legislation referred to:
Companies Act 1965, s. 226
Contracts Act 1950, s. 24
Contracts (Malay States) Ordinance 1950, s. 24
Kelantan Forest Rules 1939, r. 20(1)
National Forestry Act 1984, ss. 21(3), 23(1)
Specific Relief Act 1950, s. 54(f)

Other sources referred to:
Pollock and Mulla on the Indian Contract Act, 7th Edn., p. 145
C.M. Row on Law of Injunctions, 4th Edn.

For the plaintiff - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku & Co.
For the 1st and 2nd defendants - Prasad Abraham; M/s. Abraham & Partners
For the 3rd defendant - Aiznin Sairi Sulaiman

JUDGMENT

Edgar Joseph Jr J:

The three defendants herein, who for brevity and convenience I shall refer to as D1, D2 and D3, have applied, *inter partes*, by way of summons in chambers (encl. 12) for discharge of an *ex parte* interlocutory prohibitory injunction restraining them, their servants or agents, from taking possession of a sawmill standing on certain land comprised in L.O. 1097, in the Mukim of Jeli, Tepi Sungai Daerah Jeli, Jajahan Tanah Merah, ("the land") together with all plant, machinery and vehicles thereon ("the sawmill") disposing of the same or from doing any act whereby the plaintiffs would be deprived of its continued occupation and/or quiet possession until further order.

In order to understand the issues which arise for decision it is necessary first of all to set out, at least briefly, the essential facts so far as material to this suit and which were not in dispute.

The plaintiffs are an incorporated company having their registered office at Jalan Kampong Bahru in Sungei Petani, in the state of Kedah.

D1 and D2 are the joint and several receivers and managers of all the assets of an incorporated company called Syarikat Kilang Kayu Pekan Jeli Sdn. Bhd. ("SKKPJ"), charged to a bank called Bank Pembangunan Berhad ("D3") by a debenture and supplemental debenture dated 8 September 1980 and 28 September 1981 ("the principal debenture" and "the supplementary debenture" respectively and, jointly, as "the debentures"), having been appointed as such pursuant to a deed of appointment dated 21 September 1984 by D3, thereby conferring upon them all the powers of receivers and managers under the debentures.

Certain provisions of the principal debenture dated 8 September 1980, will need to be mentioned, but only because much argument was pressed upon me regarding them at the hearing although I hasten to add, in the view I take, of the legal position, they are only marginally relevant in the sense that they shed light on the way in which Counsel developed their respective cases.

By s. 10.03 of the principal debenture, it was provided, *inter alia*, that the receivers and managers shall have power to lease or otherwise deal with the charged assets of SKKPJ on such terms in the interest of the bank D3 as they shall think fit and, for such purposes, to execute such assurances, transfers, leases and any other documents in the name and on behalf SKKPJ.

By s. 10.04, it was provided, *inter alia*, that D1 and D2 had become irrevocably appointed attorneys of SKKPJ to do all acts which may be required or deemed proper for any of the purposes stated in s. 10.03.

On 2 July 1987, the plaintiff and D1 and D2 as receivers and managers of SKKPJ, had executed, contemporaneously, a concession agreement and a lease agreement, both in writing and dated the same day ("the concession agreement" and "the lease agreement", respectively).

Some of the provision of the concession agreement and the lease agreement are of pivotal importance to this application and so it will be necessary to refer to them.

The concession agreement begins by reciting that the parties thereto are SKKPJ, a company under receivership, and whose receivers and managers are D1 and D2, both of Messrs. Anuarul Aziz & Co., a firm of chartered accountants, and the plaintiffs herein. (Recital 1.)

It next provides that SKKPJ had been allotted 900 acres of timber concession area in Kawasan Jeli in the State of Kelantan ("the concession area"). (Recital 2.)

It further provides that SKKPJ had agreed to appoint the plaintiffs as independent contractors for the purpose of logging the concession area on certain terms and conditions contained in the lease agreement, some of which will need to be referred to. (Recital 3.)

It further provides under the sub-heading "Condition Precedent", that the concession agreement shall be conditional upon the execution of lease agreement and that it ("the concession agreement") shall continue in force unless and until the lease agreement is terminated. A further condition precedent to the commencement of any work under it is that the plaintiffs are required to deposit with SKKPJ a performance bond, in due form, in the sum of RM50,000 for the due observance and performance of their obligations under the concession agreement, the same to be refundable on satisfactory execution of such work. (Clauses 1(a) and (b).)

It further provides for the consideration moving from the plaintiffs to SKKPJ; it states that the plaintiffs had agreed to pay (1) all licence fees, royalty and other charges (except premium) payable by SKKPJ to the Relevant State Authorities in respect of the concession area, (2) certain sums of money to SKKPJ for the timber extracted from the concession area calculated according to the gross tonnage thereof in the manner specified therein and (3) all expenses for logging operations. (Clauses 3 and 4.)

It further provides that the plaintiffs are to comply with all legal requirements including rules and regulations for the carrying out of the logging operations and to keep indemnified SKKP in the event of any breaches of the same. (Clause 8.)

It was also clearly within the contemplation of the parties that at least some of the provisions of the concession agreement might not be enforceable for the concession agreement next provides, generally, for what is merely declaratory of the law as to illegality, namely, that if any part of the concession agreement were invalid then the same should be severable and would not affect the validity of the rest of the parts provided that the invalidity did not substantially nullify the underlying intent of the concession agreement. (Clause 12.)

I must now direct attention to certain provisions of the lease agreement.

By its recitals, it provides by way of preliminary that SKKPJ as registered proprietors of the land with the sawmill standing thereon together with all plant and machinery specified therein ("the dismissed premises") had by their receivers and managers D1 and D2 agreed to lease the same to the plaintiffs for a period of two years with effect from 2 July 1987, on the terms and conditions appearing therein. (Recitals 1, 2 and 3 and Clause 2.)

It next provides for the consideration moving from the plaintiffs to SKKPJ and, as will be immediately perceived, these provisions are inextricably tied to the concession agreement. More specifically, it provides that the rental for the demised premises shall (1) for the first six months, be calculated on the volume of sawn timber produced at RM12 per ton, (2) for the seventh month and thereafter until the expiration of the lease, it shall be calculated in like manner save and except that there was to be a guaranteed minimum payment of RM10,000 p.m. (Clause 3 (i) and (iii).)

It next provides that all expenses for logging operations were to the account of the plaintiffs. (Clause 4.)

It next provides for an option to renew which is the linch pin of the plaintiffs' claim as pleaded in their statement of claim. More specifically it provides that upon expiration of the two year term of the lease, SKKP had agreed to grant to the plaintiffs an option to renew the lease for a further period of two years on the same terms as before provided there was no breach on the part of the plaintiffs, the same to be exercised by the plaintiffs giving to SKKPJ three months' notice of such intent before the expiration of the lease on the same terms as before. (Clause 7.)

It further provides that in the event that the plaintiffs fail to complete the period of the lease they are to pay to SKKPJ the sum of RM50,000 being liquidated damages the same to be realised by enforcing a performance bond of RM50,000 the deposit of which was a condition precedent to the lease agreement and required for the due observance of the same. (Clause 10.)

As in the case of the concession agreement, the lease agreement, also contained a provision declaratory of the law as to illegality by providing for severability of any invalid parts thereof provided that the invalidity does not substantially nullify the underlying intent of the lease agreement. (Clause 13.)

I must now construe the provisions of the concession agreement and the lease agreement with a view to ascertaining their legal effect. In this context my task is to look at their substance rather than their form; not allowing myself to be unduly swayed by any labels which the parties may have used in entering into the transaction hereinbefore mentioned.

First of all, I would say that reading the lease agreement one finds in it an atmosphere of unreality. In any genuine lease the rent must be a fixed and definite sum whereas under the lease agreement, it must of necessity be a fluctuating sum depending on the tonnage and type of timber extracted.

Secondly, reading the lease agreement one finds that SKKPJ have virtually abdicated all their responsibilities of complying with the legal requirements, including rules and regulations, for the logging operations in the concession area. Moreover, the provisions regarding the consideration moving from the plaintiffs to SPKKPJ to which I have referred emphasise that fact.

Without mincing words, I would say that the inevitable conclusion to which I am driven is that the provisions of both the concession agreement and the lease agreement, were merely a devise to cloak what was in substance and effect a transaction involving a sale of rights held by SKKPJ to fell and extract timber in the concession area. These rights would, of necessity, be conferred by the State Government of Kelantan by licence issued under the relevant Forestry Enactment in the form prescribed by the Rules made thereunder and be personal to the holder and so not transferable.

It is necessary to make specific reference to the relevant statutory measures.

So far as the concession agreement is concerned, the relevant statute is the National Forest Act 1984, which was made applicable to the State of Kelantan in 1986. The relevant licence, being Licence No. 70/87 to fell and to extract timber (Ex. AA1 to encl. 33) was issued pursuant to s. 21(3) to Penerima and Pengurus, SKKPJ Jeli Sdn. Bhd. and, by s. 23(1), such a licence shall not be capable of transfer or assignment.

So far as the lease agreement is concerned, this was governed by the Kelantan Forest Rules 1939. The relevant licence to operate a sawmill, being Licence No. KN 24/74 (Ex. AA2 to encl. 33), was issued pursuant to r. 20(1) to SKKPJ Jeli Sdn. Bhd. Paragraph 1 of the additional conditions of the licence provides that the licence "shall not be transferable either by way of rent, mortgage lease, charge, loan, sale or in any other way so as to cause the transfer of or otherwise dispose of, including changes in the shareholders of the whole sawmill or plywood/veneer mill or any portion thereof, or any equipment or part of any equipment therein, **without the prior written approval of the State Authority**". (Emphasis supplied.)

Clause 6(d) of the lease agreement provided that the plaintiffs were to be responsible for obtaining the proper consent, registration or licences for the carrying on of the business on the demised premises and shall indemnify SKKPJ against all claims, losses or liabilities arising from the breach of this clause.

It was common ground that no prior consent for purposes of para. 1 of the additional conditions of the licence to operate a sawmill (Ex. AA2 to encl. 33) had been even applied for, much less obtained, by the plaintiffs.

However, Counsel for the plaintiffs attempted to persuade me that all that the plaintiffs were seeking to enforce was not any agreement for transfer of SKKPJ's license to operate a sawmill but the lease agreement. (Ex. PAA1 to encl. 11), the subject matter of which was certain premises and the machinery described therein. On this basis, it was argued that there was nothing in the Kelantan Forest Rules or any other relevant statute which rendered an agreement for the letting of any premises and machinery simpliciter illegal and void *ab initio*. Accordingly, the lease agreement was not tainted with illegality and was therefore capable of specific performance - so it was said.

It is manifestly clear that it was the intention of the parties to the lease agreement that the plaintiffs should operate the sawmill; this is could not have done without the relevant license which was and still is in the name of SKKPJ. The attempt, therefore, to separate the lease agreement from the license to operate the sawmill is an exercise in futility as there cannot be a lease to operate the Sawmill without the license to do so and since the plaintiffs had gone into possession of the sawmill and continue to use the license to operate a sawmill without the necessary prior consent in writing of the Relevant State Authority, there has been and there continues to be a clear breach of the relevant statutory provisions and of para. 1 of the additional conditions hereinbefore mentioned.

The provisions of the relevant statutes make it clear that a person in the position of the plaintiffs cannot lawfully exercise rights in a reserved forest or, for that matter, lawfully exercise rights in a sawmill, by virtue of licenses granted to someone else save with the prior written approval of the Relevant State Authority.

I am therefore satisfied that the concession agreement and the lease agreement were in truth and in fact an attempt to sell and to purchase SKKPJ's rights under the license to fell and extract timber and the license to operate a sawmill.

Accordingly, I hold that both the concession agreement and the lease agreement were illegal having regard to s. 24 of the Contract Act (Revised - 1974) as being of such a nature that if permitted they would defeat the provisions of the law and that they are by reason of that section void. I need hardly add that it is not possible to invoke the doctrine of severance to save the agreements since, to quote the language chosen by the parties themselves, the invalidity substantially, if not wholly nullifies their underlying intent.

I am supported in this by the following passage in *Pollock and Mulla on the Indian Contract Act*, 7th Edn., p. 145: quoted with approval by Thomson J in *Hee Cheng v. Krishnan* [1955] MLJ 103:

> Where a specific kind of land or specific rights in land have been declared by the Legislature to be not transferable, a transfer of such land or rights in land is void, as to permit it would be to defeat the provisions of the law within the meaning of the section, (the section being s. 23 of the Indian Contracts Act which corresponds to s. 24 of our Contracts Act).

At this point, I would interpolate to remark, in passing, that the facts of this case as disclosed in evidence recalled to my mind *Leong Poh Chin v. Chin Thin Sin* [1959] MLJ 246 which I think I ought to follow because it sets out the principles which I ought to apply. In his judgment Good J (as he then was) said at p. 247:

> It is perfectly clear from the wording of ss. 20 and 22 of the Enactment (the Forest Enactment (Cap. 153)) that a person cannot lawfully exercise rights in a reserved forest by virtue of permission granted to someone else. On the plaintiff's own evidence his wife actually operated in purported exercise of rights assigned to her by the defendant. This was a clear breach of the provisions of the Enactment and an illegality. It was also on the plaintiff's own case the consideration for the loan. Section 24 of the Contracts (Malay States) Ordinance 1950, declares void every agreement of which the object or consideration is unlawful. If the agreement is void it cannot be enforced. It is a mere nullity.

Now, how does my conclusion regarding the illegality of the concession agreement and the lease agreement affect the application before me? It affects it in this way: to maintain the interlocutory injunction which although negative in form, is positive in substance would, in effect, be tantamount to granting specific performance of an illegal agreement so that the Court may not lend its aid to achieve this object. On this ground alone, I would discharge the interlocutory injunction.

Equally, where a contract is tainted with illegality no relief can be granted in the shape of an injunction. (See *Davies v. Mukuna* 29 Ch D 596 and *Woodward v. Battersea Corporation* [1911] 104 LT 51 quoted in *C.M. Row on Law of Injunctions*, 4th Edn.). Indeed, the Specific Relief Act 1950, (Act 137) by s. 54 (f) provides that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be enforced. To accede to the plaintiffs' claims, therefore, would be tantamount to maintaining, in *status quo*, an illegality.

There are two further grounds why the interlocutory injunction cannot stand.

In the first place, I was satisfied that the plaintiffs' claims, if enforceable in law at all, would be sufficiently met by an award of damages provided, or course, SKKPJ are joined as co-defendants, which, of course, can only be done after leave under s. 226 of the Companies Act 1965, has first been obtained, since according to Counsel, they had been compulsorily wound up on 25 April 1988 pursuant to a winding-up petition presented to the High Court, Kuala Lumpur, on 28 June 1986.

In the second place, were I to maintain the interlocutory injunction I would virtually be giving the plaintiffs the whole of the reliefs they are seeking at the final hearing, for as in the case of *Noor Aini binti Majid v. Pentex Sdn. Bhd.* [1987] CLJ (Rep) 807, it is most probable that by the time the day of the final hearing arrives, the period of the lease agreement, pursuant to the exercise of the option, would have expired. This, by itself, would be no bar to the interlocutory injunction being maintained provided there is plainly no defence to the action and the only object in raising a defence is to obtain delay. (See *Manchester Corporation v. Connolly* [1970] 1 Ch 420.) But, I am unable to say that the defence of the defendants herein comes within the range of such cases.

By way of postlude, I would add, that although the points as to illegality was not raised before me nor had D1 or D2 pleaded it, there is ample authority for the proposition that it is the duty of the Court to take the point. (See *Phillips v. Copping* [1935] 1 KB 15 and *Hee Cheng v. Krishnan* [1955] MLJ 103 cited with approval by Good J in *Leong Poh Chin v. Chin Thin Sin* (*ibid*)). However, I did give Counsel on both sides every opportunity to deal with the point and indeed, I had adjourned the date fixed for delivery of judgment to enable them to address me on the same.

For the foregoing reasons, there must be an order for discharge of the injunction in terms of prayer 1 (i) of the summons. Costs will be in the cause.

Also found at [1990] 2 CLJ 715